IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Brief September 20, 2007

BESSIE MCGILL v. STATE OF TENNESSEE

Direct Appeal from the Tennessee Claims Commission
No. 20201828 Stephanie R. Reevers, Claims Commissioner

No. M2007-00040-COA-R3-CV - Filed January 16, 2008

The Claims Commission dismissed Claimant's action pursuant to Tennessee Code Annotated § 9-8-402(b) and for failure to reply to the Commission's show cause order. We affirm.

Tenn. R. App. P. 3 Appeal as of right; Judgment of the Claims Commission Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, J., and HOLLY M. KIRBY, J., joined.

Sonya W. Henderson, Murfreesboro, Tennessee, for the appellant, Bessie McGill.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael e. Moore, Solicitor General and Heather C. Ross, Senior Counsel, for the State of Tennessee.

OPINION

This is a personal injury case on appeal to this Court from the Tennessee Claims Commission ("the Commission"). In November 2002, Claimant Bessie McGill ("Claimant") filed an action in the Commission alleging injuries sustained in the Learning Resource Center of Middle Tennessee State University. In her complaint, Claimant asserted that she was injured when a wheel of a chair in which she was seated caught in a "hole" behind the computer station at which she was working. She sought damages in the amount of $200,000. Following the Commission's grant of the State's motion for an extension of time, the State answered the complaint on February 19, 2003, and denied Claimant's allegations of a dangerous condition and negligence.

On February 20, 2003, the Commissioner advised Claimant's counsel, in writing, that the State had responded to her complaint and requested counsel to confer with the State's attorney and submit four mutually agreeable dates for trial. The Commissioner also advised counsel of the requirements of Tennessee Code Annotated § 9-8-402(b), quoting the pertinent statutory language that provides:

> [a]bsent prior written consent of the commission, it is mandatory that any claim filed with the claims commission upon which no action is taken by the claimant to advance the case to disposition within any one-year period of time be dismissed with prejudice.

In October 2003, counsel for Claimant informed the Commissioner in writing that she was in the early stages of discovery and requested the case be "re-diaried for status in six months."

On September 21, 2004, the Commissioner advised counsel for both parties, in writing, that her review of the file in this case indicated that it had been pending for "some time." The Commissioner requested counsel to contact her office to schedule a hearing date. Counsel for Claimant failed to respond. On February 6, 2006, over sixteen months later, the Commissioner issued a show cause order referencing section 9-8-402(b) and the Commissioner's prior correspondence, and ordering Claimant to show cause within thirty days why the claim should not be dismissed for failure to prosecute. The Commissioner advised, "[f]ailure to respond to this Order will result in the dismissal of this action without further notice." Claimant's only response to the show cause order was to file a "motion for scheduling order" on February 24, 2006. No further action was taken and, on July 11, 2006, the Commissioner dismissed the claim for failure to respond to the show cause order and for failure to prosecute pursuant to section 9-8-402(b).

On July 18, 2006, Claimant filed a "motion to reinstate pursuant to Rule 60.02 or reconsider." In her motion, Claimant asserted that she had attempted to set medical proof on several occasions, but that counsel for the Attorney General had refused to set proof until she was able to depose the Claimant. She further asserted that an expert witness had been obtained but had passed away, and that a new expert had generated a report on July 5, 2006. Claimant additionally asserted her failure to respond to the Commission's show cause order was due to excusable neglect on the part of counsel, who assumed the filing of her "motion for scheduling order" was sufficient response. The Commissioner denied relief pursuant to Rule 60.02.

Claimant again moved for relief from final judgment in October 2006. (TR at 56) In her motion styled "motion for relief from final judgment," Claimant sought relief pursuant to Rule 60 and asserted that, although "little activity may have been occurring in the Claims Commission, the parties were engaged in discovery . . . ." Counsel for Claimant further asserted that she had been "under the impression that some response had been generated in response to the tribunal's order to show cause" and that she had directed her paralegal to prepare a response to the order in addition to requesting a scheduling order. Counsel asserted that her paralegal had failed to prepare a response and had failed to advise her of this oversight. Claimant's counsel attached an affidavit in support of her assertions that discovery had been ongoing. The State opposed the motion, attaching an affidavit of State's counsel asserting that discovery requests had indeed been sent to Claimant, but that a response had not been forthcoming. Counsel for the State further stated, "Claimant had never asked the State for more time to respond to the discovery requests, [notified the State] that she had hired an expert and that he had passed away, or had hired another expert." The Commissioner denied Claimant's motion on December 7, 2006, and this appeal ensued.

Issue Presented

The single issue presented for our review is "[w]hether the Claims Commission erred in failing to grant Appellant's request for Rule 60 relief when Appellant demonstrated proper grounds for relief from judgment."

Standard of Review

We review a trial court's decision to grant or deny relief pursuant to Rule 60.02 under an abuse of discretion standard. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003).

Analysis

We find no abuse of discretion in this case. First, Claimant's failure to respond to the Commissioner's show cause order provides adequate justification for dismissal of this action. Clearly, Claimant in this case had notice that her action would be dismissed if she failed to respond to the Commissioner's order. Counsel's assertion, in her second Rule 60.02 motion, that her paralegal failed to follow her instructions to draft a letter in response to an order of the Commission does not, without more, constitute excusable neglect where that letter necessarily would have required counsel's signature. Unlike the appellant in *Henry v. Goins*, 104 S.W.3d 475 (Tenn. 2003), wherein the supreme court upheld the trial court's grant of a Rule 60.02 motion where the court had dismissed plaintiff's action for failure to prosecute *sua sponte* and without notice, it is undisputed in this case that Claimant's counsel had notice of the Commission's intent to dismiss this cause for failure to prosecute in the absence of an adequate response to the Commission's order. Further, even assuming that, as opined in the unreported case of *World Relief Corporation of the National Ass'n of Evangelicals v. Messay*, No. M2005-01533-COA-R3-CV, 2007 WL 2198199, at *7 (Tenn. Ct. App. July 26, 2007), under *Henry v. Goins*, the Tennessee law "no longer categorically excludes 'mere negligence' or 'carelessness' of an attorney from the scope of 'excusable neglect' under Tenn. R. Civ. P. 60.02(1) with regard to setting aside default judgments," which the *Goins* court analogized to dismissals for failure to prosecute, an attorney's failure to respond to a court order that undisputedly was received by the attorney is not *excusable* neglect. As this Court has noted, "not all negligence can be indulged. To do that would read out of the excusable neglect principle the requirement that the neglect must first be found excusable. Finding whether neglect is excusable is an equitable determination 'taking account of all relevant circumstances surrounding the party's omission.'" *Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d 557, 567 (Tenn. Ct. App. 2001)(citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993); *Dubuc v. Green Oak Township*, 958 F.Supp. 1231, 1241 (E.D.Mich.1997)). In light of the entirety of the circumstances in this case, we cannot say the Commission abused its discretion by denying relief under Rule 60.02 where counsel failed to respond to its show cause order and where that order provided notice that failure to respond would result in dismissal.

Second, section 9-8-402(b) mandates dismissal of an action before the Commission that has not been advanced within any one-year period, absent prior written consent of the Commission.

Although Claimant asserts that the parties were actively engaged in discovery in the one-year period preceding dismissal, this assertion is not supported by the affidavits contained in the record. In her affidavit, Claimant's counsel submits that several events had caused delays in the proceedings, and that she had attempted to schedule depositions and to take medical proof. She does not, however, state the dates of her correspondence or communication with opposing counsel. Accordingly, even assuming such communication would constitute adequate "action" for the purposes of section 9-8-402(b), we cannot determine whether Claimant took any action during the one-year period preceding the Commissioner's show cause order.

Claimant also contends that the affidavit submitted by the State's counsel supports her assertion that the parties were engaged in discovery as late as September 2005. The affidavit of counsel for the State included in the record, however, indicates only that the State sent written correspondence to counsel for Claimant within the one-year preceding the Commissioner's show cause order. In her affidavit, the State's counsel stated that she had repeatedly sought responses to her discovery requests and that she had notified Claimant's counsel that she would move to dismiss for failure to prosecute should responses not be forthcoming. As noted above, the State's counsel asserted in her affidavit that Claimant had never requested additional time to respond or informed the State that she had obtained an expert. The affidavit submitted by the State's counsel does not demonstrate that Claimant took any action to advance the case to disposition as mandated by section 9-8-402(b). In the absence of any proof demonstrating action taken by the Claimant to advance the case to disposition in the relevant one-year period, dismissal was statutorily mandated in this case.

Holding

In light of the foregoing, we find no abuse of discretion in the Commissioner's denial of Claimant's Rule 60.02 motion. Judgment of the Commission is affirmed. Costs of this appeal are taxed to the Appellant, Bessie McGill, and her surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE